

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
DANIEL F. KOLODZIEJ and) CASE NO. 09-21223 JPK
VALERIE R. KOLODZIEJ,) Chapter 13
)
Debtors.)

MEMORANDUM OF DECISION REGARDING OBJECTION
TO CHAPTER 13 PLAN ("OBJECTION") AND RENEWED MOTION FOR
RELIEF FROM STAY AND ABANDONMENT ("STAY RELIEF MOTION")

The Objection was filed on April 23, 2009 by LaSalle 115 Holdings, LLC – Series 1, assignee of Harris, N.A., successor in interest to Mercantile National Bank of Indiana ("LaSalle"). The Stay Relief Motion was filed by LaSalle on November 23, 2009¹. Various preliminary pre-trial conferences were held with respect to both the Objection and the Stay Relief Motion, due to the parties' attempts to resolve both without further submission to the court. Those attempts proved unsuccessful, and an evidentiary hearing was held on January 21, 2010 with respect to both contested matters. At that hearing, LaSalle 115 Holdings appeared by counsel Mark A. Warsco; the debtors appeared by counsel Kevin M. Schmidt; and the Chapter 13 Trustee appeared by counsel Julia M. Hoham.²

Due to the overlap of factual issues with respect to both the Objection and the Motion, analysis of matters with respect to both contested matters are stated in this single Memorandum of Decision. Despite that, the separate determination made with respect to each of the contested matters constitutes a final judgment with respect to each discrete contested matter.

¹ The motion is entitled as "renewed" because the creditor had filed a nearly identical motion on April 23, 2009, which was denied without prejudice by an order entered on May 28, 2009.

² On September 11, 2009, the Chapter 13 Trustee filed an objection to confirmation of the debtors' plan. This objection was not involved in the January 21, 2010 hearing. As stated in docket record entry #63, the Trustee's objection was withdrawn at a hearing held on February 1, 2010.

The court has jurisdiction over both contested matters pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and N.D.Ind.L.R. 200.1. The contested matter concerning the Objection is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L). The contested matter arising from the Stay Relief Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).

I. STATEMENT OF RECORD

At the evidentiary hearing held on January 21, 2010, in addition to the testimony of the witnesses, the following documents were submitted into evidence and admitted as part of the record:

1. The evidentiary materials stated in the Stipulation of Facts, Exhibits and Witnesses filed on January 21, 2010 as docket record entry #62;
2. LaSalle's Exhibit Numbers 1, 2, 3, 4, 6, 8 and 9;
3. Debtors' Exhibit B;
4. Debtors' Schedules and Statement of Financial Affairs, as filed in case number 09-21223.
5. The proof of claim filed by LaSalle in this case.
6. 2-page "Treasurer–Lake County, Indiana Tax Record" with respect to the subject real estate.

II. STATEMENT OF ISSUES

The Objection is premised upon LaSalle's assertion that the plan does not comply with 11 U.S.C. § 1325(a)(5)(B)(ii) and, interrelatedly, 11 U.S.C. § 1325(a)(6), due to asserted undervaluation of the real property in which LaSalle holds a security interest.

The issues with respect to the Stay Relief Motion are the following:

1. Whether relief should be granted for cause pursuant to 11 U.S.C. § 362(d)(1), essentially upon the assertion that the debtors cannot submit a confirmable plan based upon their alleged inability to pay LaSalle's allowed secured claim in the amount asserted by

LaSalle;³

2. Whether relief should be granted pursuant to 11 U.S.C. § 362(d)(2); and
3. Whether abandonment of the subject property should be ordered pursuant to 11 U.S.C. § 554(b).

III. LEGAL ANALYSIS

Much of the parties' disputes with respect to both contested matters hinges on the valuation to be placed upon the business property sought to be maintained by the debtors in their Chapter 13 plan, at 925 North Shelby Street, Gary, Indiana. The valuation issue presented by both contested matters is best addressed with respect to the Objection, and that is where the court will begin.

A. The Objection

The specific focus of the Objection is that the plan does not comply with 11 U.S.C. § 1325(a)(5)(B)(ii), in that LaSalle asserts that the value ascribed by the debtors to property with respect to which LaSalle has a secured claim is less than the allowed amount of that claim determined pursuant to 11 U.S.C. § 506(a). While paragraph 7 of the Objection does not specifically object to confirmation pursuant to 11 U.S.C. § 1325(a)(6), at the January 21, 2010 hearing it became apparent that this issue also was before the court with respect to the valuation ascribed to LaSalle's allowed secured claim, as proposed to be paid by the debtors' plan.

The real estate at issue between the parties is not a residence, and thus pursuant to 11 U.S.C. § 506(a), the value required to be paid by the debtors pursuant to 11 U.S.C.

³ While the Motion asserts that the stay should be lifted because LaSalle received no adequate protection payments, because the Trustee cannot disburse payments provided for by a plan until the plan has been confirmed [11 U.S.C. §1326(a)(2)] – absent an order of the court providing for pre-confirmation disbursement – this portion of the Motion fails to state a claim for relief.

§ 1325(a)(5)(B)(ii) is the fair market value of LaSalle's interest in the property on the date of confirmation of the plan. For the purposes of determining this value, the date of valuation is the date of the hearing held on January 21, 2010, and both parties approached that valuation hearing as the mechanism for determination of the value pursuant to § 506(a) to be provided for by § 1325(a)(5)(B)(ii).

Evidence of the value of property was provided by LaSalle's witness Aaron Ingram, and by the debtors' witness Leonard Pryweller. Both witnesses were accepted by the court as experts pursuant to Fed.R.Evid. 702.⁴

The court begins its analysis of the value of the property by stating certain matters established by the evidence. Mr. Ingram is a certified appraiser and Mr. Pryweller is not. Mr. Pryweller has a substantial amount of experience in sales of real property in the vicinity in which the subject property is located, while Mr. Ingram has none. Mr. Pryweller testified that there were no comparable sales with respect to the subject real estate. Mr. Ingram based his appraisal almost entirely upon what he deemed to be relatively comparable sales in the general area of the subject property, adjusted – as appraisers do – to conform perceived comparable sales to the qualities of the subject property. Mr. Pryweller stated that his analysis was not a formal appraisal, but was more in the nature of a market analysis. Mr. Ingram conducted a formal appraisal. Mr. Pryweller was involved in the sale of the subject property to the debtors as a broker, in 2005. Mr. Ingram has no relationship to the subject property, apart from his personal inspection of it and his appraisal analysis.

Deriving a fair market value for real estate is best done by one of two ways: either a relatively recent sale of the subject property itself, adjusted for subsequent trends in the market;

⁴ Mr. Ingram's qualifications were stipulated to by the debtors' counsel. Mr. Pryweller's qualification as an expert was objected to by Attorney Warsco, but that objection was overruled by the court.

or sales relatively recent to the date of valuation of the subject property with respect to comparable properties.⁵ Unfortunately, neither of these most indicative valuation methods are

⁵ The concept of “comparable sales” has been addressed in a number of federal court decisions, principally those that involve federal eminent domain proceedings. The issue in federal condemnation is the value of property on the date of the taking, an issue very similar to valuation of an allowed secured claim for purposes of confirmation of a Chapter 13 plan. As stated in *Trout v. United States*, 386 F.2d 216, 222-223 (5th Cir. 1967):

In presenting this evidence of comparable sales to prove that special benefits to the remainder nearly offset the landowners' loss of 210 acres, the Government was making as strong a case as could be expected; for the courts have said repeatedly that comparable sales—sales from a willing seller to a willing buyer of similar property in the vicinity at or about the same time—constitute the best evidence of market value. See, e.g., *United States v. 60.14 Acres of Land, etc.*, 3d Cir. 1966, 362 F.2d 660, 665; *United States v. Whitehurst*, 4th Cir. 1964, 337 F.2d 765, 775; *United States v. Featherston*, 10th Cir. 1963, 325 F.2d 539; *United States v. 5139.5 Acres of Land, etc.*, 4th Cir. 1952, 200 F.2d 659; *Baetjer v. United States*, 1st Cir. 1944, 143 F.2d 391, 397.

The concept that a comparable sale must be “in the vicinity” of the subject property has been repeatedly stated in federal condemnation litigation, as stated in *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 662 (4th Cir. 1952):

The rule is well settled in most jurisdictions that ordinarily ‘the value of lands, or interests in realty, at a particular time, may be proved by evidence of voluntary sales of similar property in the vicinity, made at or about the same time.

A comparable sale must resemble the subject property with respect to the location of the comparable sale, among other factors, as stated in *United States v. 534.28 Acres of Land*, 442 F. Supp. 82, 84-85 (M.D.Pa. 1977):

Sales of comparable land in the area provide valuable assistance in determining fair market value. See *United States v. Featherston*, 325 F.2d 539 (10th Cir. 1963). A comparable sale must be one that sufficiently resembles the parcel in question with respect to time, place and circumstances that reasonable men would consider it in evaluating fair market value. Nichols on Eminent Domain, s 13.02(4) “Selection and Presentation of Comparable Sales.”

However, when comparable sales data is lacking, the valuation to be placed upon real estate becomes more problematic, as stated as follows in *Baetjer, et al. v. United States*, 143 F.2d 391, 397 (1st Cir. 1944):

On their faces the deeds show transactions, apparently at arm's length, in lands on Vieques in the vicinity of those taken at about the time of the taking. Clearly such transactions have a tendency to show fair market value. In fact, in the absence of recent transactions of a like nature involving the land taken itself, they are the best evidence of market value. What comparable land

fully functional in this case.

The testimony of Mr. Pryweller establishes to the satisfaction of the court that the Miller area of Gary in which the subject property is located is essentially unique, both with respect to the Miller area in general and with respect to the location of the property within a small cell of commercial properties surrounded by an exclusively residential area in a circumstance in which the commercial cell is not an end destination. Mr. Pryweller was careful to phrase his market analysis in terms of not utilizing comparable sales, while Mr. Ingram's fair market value appraisal was based primarily on comparable sales. With respect to "comparables" utilized by Mr. Ingram, the court determines that properties located in Griffith, Indiana; Highland, Indiana; Lowell, Indiana; and Hobart, Indiana are not in the vicinity of the subject property, and that therefore any reliance upon sales of properties in those locations does not provide a valid basis for a comparable sales analysis. Given the unique nature of the Miller area of Gary and the location of the subject property within that area, comparable sales cited with respect to 1525-1527 Broadway in Gary, Indiana and 2337 Broadway in Gary, Indiana – are not within the vicinity of the subject property either. Moreover, these properties are located on the principal north/south thoroughfare running through the heart of the City of Gary, and linking the City of Gary to all of Lake County south of it. These properties are located on a major commercial route, and thus they do not share characteristics in common with the subject property which allow for their use as valid comparable sales. Finally, one might posit that the property at 2808 DeKalb Street in Lake Station, Indiana is within the vicinity of the Miller area of Gary. However, the sales data with respect to this property establishes the last sale in January of 2008 – two

changes hands for on the market at about the time of taking is usually the best evidence of market value available. In the absence of such evidence a determination of value becomes at best only a guess by informed persons. *United States v. Miller*, 317 U.S. 369, 375, 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55.

years prior to the date of the valuation trial in this case, and before the economic collapse of real estate values throughout the country and in Northwest Indiana. Moreover, this property is a mixed use property, comprised of both retail and residential apartment space, which differentiates it clearly from the subject property which is only suitable for use in its present configuration as a commercial property. Thus, the Lake Station property is a dubious comparable at best. The major underpinning of Mr. Ingram's valuation analysis was his comparable sales analysis, which the court finds to be lacking in credible basis, given the federal standard for a "comparable" sale.

The subject property was purchased by the debtors in 2005 for approximately \$147,000.00, which value – based upon Mr. Pryweller's testimony – is too remote in time as to circumstances affecting values of property in the location of that of the subject property to establish its actual fair market value. Mr. Pryweller testified that there were no actual comparables in relation to the subject property, and while he listed certain sales in his evaluation report, he made it clear that those listings were not comparable sales, but were merely referenced to indicate market trends in the real estate market in Northwest Indiana. Mr. Ingram acknowledged that there were no nearly identical properties, and that his appraisal was based upon adjustment of what he deemed to be relatively comparable sales given the circumstances of the subject property being within a largely residential area which included some commercial properties and some commercial traffic.

The court determines that no probative comparable sales, as defined by federal law, were utilized by either Mr. Ingram or Mr. Pryweller in arriving at their stated opinions of value. The court accepts the testimony of Mr. Pryweller that the area in which the subject property is located is a unique area in Gary, Indiana and Lake County, Indiana, and that comparable sales simply do not exist with respect to the unique location of this property in its adjoining location, and the commercial use to which this property must be placed in order to sell it. Based upon

the testimony of the witnesses and the use to which the subject property is dedicated in the context of the issues before the court, the court deems any value based upon other than a fair market value analysis – i.e., an appraisal based upon replacement cost or upon income analysis – to be inapplicable to the subject property.

Based upon the foregoing, the court determines that the comparable sales utilized by Mr. Ingram are not reflective of the value of a transfer of the subject property between a willing seller and a willing buyer, under no compulsion to buy or sell. The court also determines that the quoted sales by Mr. Pryweller in his analysis are not comparable sales, either. Thus, we are left with a circumstance in which analysis of the value of the subject property is not subject to a comparable sales approach, based upon the record before the court.

The base line for valuing the subject property is the debtors' purchase of it in 2005 for a purchase price of \$147,000.00. Subsequent to the purchase, the evidence establishes that the debtors made physical improvements to the property, which Daniel Kolodziej testified enhanced its value. However, the tenant of the immediately adjoining property – The Beach Café – closed its business subsequent to the purchase, leaving an empty commercial property which had been structured for use as a restaurant. The court finds that this closing diminished the value of the subject property. As established by testimony of record, the property is in a unique area of Miller, which is in essence a political/geographic/economic subdivision of the City of Gary, Indiana. The property is situated on the northeast corner of an intersection of residential streets, and is in fact within a small commercial island within a much larger residential area. In immediate proximity to the property are a restaurant, a coffee and roll shop, and an acupuncture office. In relative proximity to the property is a small office building housing certain professional offices. However, the immediate neighborhood of the property – apart from those commercial establishments – is entirely a residential development, somewhat aged at that. Mr. Pryweller's opinion was based in part upon records obtained from the Lake County

Treasurer's Office, entirely allowable as a basis for his opinion pursuant to Fed.R.Evid. 703, and which were in part admitted into evidence. The court has a dim view of establishing fair market value by means of the assessment records of the taxing authority.⁶ Despite the court's skepticism as to establishing a fair market value in any manner by means of the valuation established by the taxing authority, "trending" analysis has some relevance with respect to establishing general property value trends in a particular area in which the subject property is located. It was for this purpose that Mr. Pryweller ascertained and utilized the taxing authority's assessed valuation in his analysis. In this context alone, the court finds that Mr. Pryweller's utilization of tax assessment records to be reasonable, and to be indicative of a trend in the valuation of property in the location of that of the subject property. That information establishes assessed "fair market" taxation values of \$103,200.00 in 2007; \$153,800.00 in 2008; and the current appraisal value of \$68,500.00.

Mr. Ingram stated a professional opinion that the fair market value of the subject property for purposes of both the Objection and the Stay Relief Motion is \$190,000.00. Mr. Pryweller did not state an opinion as to the fair market value, but he did state that if he were to now list the property for sale, the listing price would be \$125,000.00. While it might be assumed that the fair market value is something less than a proposed listing price, there is no evidence in the record which allows the court to lower Mr. Pryweller's opinion as to the property's value from the listing price of \$125,000.00.

⁶ The history of property valuation in Lake County, Indiana is long and convoluted, a history upon which the court will not further comment. Suffice it to say that within recent memory, all property in Lake County, Indiana was supposedly revalued on a "fair market value" basis for the purposes of real property taxation, and real property taxes were assessed based upon that revaluation. The Indiana Legislature then decreed that the base valuations established by that appraisal mechanism were to be subject to adjustment by means of what has been termed "trending", a process of valuation which the court deems to not rise to the level of a valid fair market value appraisal based upon any sound principles of professional property valuation.

The subject property was sold to the debtors in 2005 for \$147,000.00. The evidence establishes to the court that the value of improvements made by the debtors to the real estate, as contrasted to the value of the real estate as affected by the closing of The Beach Café, essentially set each other off. The trend of the market, as established by the evidence, is that the subject property is not now worth what the debtors paid for it in 2005. The court accepts the testimony of Leonard Pryweller that a reasonable listing price for the subject property is \$125,000.00. There is no evidence in the record as to a market value – based upon an actual sale which might occur between the debtors and a willing buyer – of below \$125,000.00.

Based upon the foregoing, the court finds that the value of the property for the purposes of 11 U.S.C. § 506(a) and 11 U.S.C. § 1325(a)(5)(B)(ii) is \$125,000.00.⁷

The manner in which the debtors' plan seeks to deal with LaSalle's allowed secured claim is not entirely clear, given that the plan provides for payment of an amount to LaSalle and also payment to the Lake County Treasurer with respect to real estate taxes on the subject property. The debtors' plan seems to provide for payment of past-due real property taxes to the Lake County Treasurer, and payment to LaSalle of an amount of \$115,000.00 less the amount of real estate taxes owed by the debtors pre-petition. However that might be, the total amount which must be provided for by the debtors' plan with respect to allowed secured claims on the subject property is \$125,000.00, an amount which the debtors' plan does not propose to pay. Thus, although LaSalle's proposed valuation of the property for purposes of § 1325(a)(5)(B)(ii) has not been accepted by the court, it is clear that the debtors' plan does not propose to pay the allowed amounts of LaSalle's claim and of the Lake County Treasurer's claim. As a result,

⁷ The value of LaSalle's allowed secured claim under 11 U.S.C. § 506(a) is the net value, after deduction of any liens having priority over those of LaSalle. Real estate taxes trump the mortgage interests of LaSalle in the property, and thus to the extent that the \$125,000.00 value determined by the court is subject to real estate tax liens having priority over the mortgage indebtedness owed by the debtors to LaSalle, the value of LaSalle's allowed secured claim is affected commensurately.

LaSalle's Objection must be sustained. LaSalle did not directly raise the issue of 11 U.S.C. § 1325(a)(6) with respect to its Objection, but it is apparent that the debtors' plan, as presently proposed, will not fund a plan based upon a determination of \$125,000.00 as the value of the subject property.

Based upon the foregoing, the court finds that the Objection should be sustained. The debtors must file a plan premised upon the value of the subject property as being \$125,000.00.

B. Stay Relief Motion

While counsel for LaSalle stated at the January 21, 2010 hearing that the Stay Relief Motion was asserted pursuant to both 11 U.S.C. § 362(d)(1) and 11 U.S.C. § 362(d)(2), the substantive focus of the motion was 11 U.S.C. § 362(d)(2).

The parties stipulated that the indebtedness owed to LaSalle is in excess of the value of the subject property, even if one were to value the subject property at \$190,000.00. Thus, the prong of 11 U.S.C. § 362(d)(2)(A) – that the debtors do not have equity in the property – has been established by the record. We thus turn to the criteria of 11 U.S.C. § 362(d)(2)(B) for determination of LaSalle's Stay Relief Motion. Both Daniel Kolodziej and Valerie Kolodziej testified that the sources of income for their funding of the plan are in significant part derived from operation of businesses they both conduct on the subject property: Mr. Kolodziej's operation of a convenience store, and Mrs. Kolodziej's operation of a fitness center. The record establishes that absent their utilization of the subject property for the conducting of their businesses, those businesses would not be available as a source of funding of their Chapter 13 plan. Thus, the retention of the property by the debtors for the operation of the debtors' respective businesses at the location of the subject property is necessary to their reorganization by means of their Chapter 13 plan. With respect to the additional component of § 362(d)(2)(B) – that the proposed reorganization be "effective" – the record establishes that at the time of the hearing, the debtors were current in payments to the Chapter 13 Trustee under their plan with

respect to a proposed valuation of the property at \$115,000.00. While perhaps increasing the value of the property to \$125,000.00 causes the debtors to stretch their budget, there is no evidence in this record that the debtors cannot formulate a plan which will allow for the increased valuation of the subject real estate in order to pay the allowed secured claim of LaSalle. Thus, at this juncture of the case, the court determines that the subject real estate is necessary to an effective reorganization of the debtors, and that thus stay relief to LaSalle must be denied due to failure to satisfy the requirements of 11 U.S.C. § 362(d)(2)(B). Given that the debtors' plan has apparently sought to cure/pay delinquencies in real property taxes, and that at the time of the hearing the debtors had made payments under their proposed plan to the Chapter 13 Trustee as required⁸ – the court finds that there is no basis for granting stay relief under 11 U.S.C. § 362(d)(1). As to the alternative request for abandonment by LaSalle, the court finds that the record does not establish that the property is “burdensome to the estate” or “is of inconsequential value and benefit to the estate”, and that the remedy of abandonment under 11 U.S.C. § 554(b) must be denied.

IV. DECISION

IT IS ORDERED as follows:

A. The objection to confirmation of the debtors' plan filed by LaSalle 115 Holdings LLC - Series 1, assignee of Harris, N.A., successor in interest to Mercantile National Bank of Indiana on April 23, 2009 is sustained.

B. Based upon the determination in immediately preceding sub-paragraph A, the debtors shall file an amended plan which provides for valuation of the subject property at \$125,000.00, within 35 days of the date of entry of the order regarding this Memorandum of Decision.

⁸ As noted above, the Chapter 13 Trustee withdrew his objection to confirmation.

C. The Renewed Motion for Relief from Stay and Abandonment filed by LaSalle 115 Holdings LLC - Series 1, assignee of Harris, N.A., successor in interest to Mercantile National Bank of Indiana on November 23, 2009 is denied.

Dated at Hammond, Indiana on July 2, 2010.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtors, Attorney for Debtors
Trustee, US Trustee
Attorney for Creditor